frustrated and angered by Moore's criticisms, came to view Moore as the enemy and, after the mid-course correction, were determined to prevent Moore and REI from obtaining the scanner contract. J.A. 190, 234-35, 347. One senior official even told REI that it would never get any USPS business so long as he was head of operations. J.A. 190.

3. Petitioners' Investigation of Moore's Political Activities. Motivated by hostility towards Moore for his role in the scanner-procurement controversy and aware that an indictment would make Moore and REI ineligible for the scanner contract, the Postal Inspectors launched a retaliatory criminal investigation. As early as December 1985—months before they uncovered the kickback scheme in which they would later attempt to implicate Moore—the Postal Inspectors prepared an "Investigative Strategies" memo that labeled Moore and REI as "coconspirators in a scheme to defraud the U.S. Postal Service," even though, as Petitioner Edwards later conceded, there was no evidence that any such conspiracy existed. J.A. 234.

Pursuant to this strategy, the Postal Inspectors scrutinized Moore's public criticisms and lobbying with no apparent regard for the First Amendment protection afforded to these activities. Pet. App. 21a-22a. They issued subpoenas for records of Moore's and REI's political contributions, "meetings with United States Congressmen," "articles placed with trade publications and reporters," and "interviews with journalists and reporters." Pet. App. 21a-22a; J.A. 431-39. They questioned REI officials about the company's lobbying efforts, political contributions, and fundraising; interrogated a congressional staffer about her congressman's assistance to REI; and even tried to dig up "dirt" to throw on REI's congressional supporters. J.A. 175, 234-37, 247-52, 394.

4. The Voss/Gnau Conspiracy. In late February 1986—after they had prepared the "Investigative Strategies" memorandum and begun to investigate Moore's and REI's

political and media activities—the Postal Inspectors discovered that Peter Voss, a member of the USPS Board of Governors, was receiving kickbacks from John Gnau, the principal of Gnau & Associates, Inc. ("GAI"). GAI was the politically well-connected consulting firm that REI had hired—on Voss's recommendation and through "an entirely normal process"—to assist with its lobbying efforts. Pet. App. 4a; J.A. 197-201. The Postal Inspectors learned that Voss and his administrative assistant, along with Gnau and two other GAI officials, including GAI's President, William Spartin,[2] were involved in the conspiracy. Pet. App. 4a; C.A. App. 304. Ultimately, three of the coconspirators pleaded guilty; the other two received immunity from prosecution in exchange for cooperation. Pet. App. 4a; J.A. 119.

The Evidence Exonerates Moore — The Postal Inspectors immediately saw the Voss/GAI conspiracy as an opportunity to tar Moore with criminal wrongdoing. The problem for the inspectors was that there was no probable cause to believe that Moore had participated in the conspiracy—and the Postal Inspectors knew it. Most significantly, though lacking any evident reason to protect Moore, none of the coconspirators ever implicated him. Pet. App. 25a; J.A. 208-10. The Postal Inspectors repeatedly urged the conspirators to do so, on occasion using "extraordinary" and improper pressure tactics, but again and again the conspirators each informed the inspectors that Moore was not involved. Pet. App. 25a. Voss even told the inspectors that there was "no way Moore knew" anything improper was occurring. Pet. App. 26a; *see also* J.A. 452 (noting Voss's exoneration of

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[2] Spartin had the dual role of President of GAI and managing partner of a subsidiary of an executive-search firm that had been hired by the Postal Service. The Postal Service was fully aware of this dual role, *see* J.A. 193, yet the Postal Inspectors subsequently claimed that Spartin fraudulently concealed his affiliation with GAI from the Postal Service.

Moore "after great reflection while sitting in a federal prison camp"). Faced with this reality, the Postal Inspectors conceded that their evidence showed only that REI, "*but not MOORE . . . individually*," might have been "aware of Voss' corrupt actions." J.A. 333 (emphasis added).

5. Petitioners' Retaliatory Efforts to Procure Moore's Indictment. Having, by their own admission, failed to find any evidence that Moore even knew of the conspiracy, let alone violated the law by joining it, the Postal Inspectors went to bizarre lengths and resorted to highly unusual and deceptive tactics to obtain Moore's indictment.

Petitioners' Retaliatory Intent — The Postal Inspectors candidly acknowledged in writing that the primary reason for their dogged pursuit of Moore and REI was Moore's effort to reverse, through lobbying and public criticism, the decision to employ single-line scanners. In a memorandum entitled "Arguments for Indicting the Corporation"—which the court of appeals described as "evidence of retaliatory motive . . . close to the proverbial smoking gun" (Pet. App. 28a)—the inspectors' *first* justification for indicting REI, which they described as being completely "*[i]ndependent of [the] Voss/GAI actions*," was that

> the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example
> a. staged questions and testimony before Congress
> b. Frost amendment to freeze USPS appropriations bill.

J.A. 329-30 (emphasis added). In other words, Petitioners' *very first reason* for indicting REI was Moore's lobbying, in both Congress and the media, against the USPS scanner decision.

Likewise, in a "Details of Offense" memorandum they prepared for the U.S. Attorney to summarize the evidence, the Postal Inspectors treated Moore's lobbying and media activities as criminal. In that document, the inspectors described Congressmen Frost and Brooks, who were

instrumental in supporting REI and requesting the OTA study that criticized the Postal Service's scanner decision, as "key players" in Moore's purported offense. J.A. 325-26. The Postal Inspectors even wrote that Moore's alleged fraudulent intent was "evident" in the fact that "at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriat[ions] bill that in effect would freeze USPS revenue until [multi-line scanners] were purchased from REI," and in the fact that "REI continued to undermine the competitive testing program via the media and Congress." J.A. 323-24; *see also* Pet. App. 21a.

Lobbying of, and Misconduct in, the U.S. Attorney's Office — In an unprecedented move, the Postal Inspectors aggressively lobbied the U.S. Attorney's Office on numerous occasions to advocate the indictment of Moore, REI and Robert Reedy, an REI vice-president. J.A. 242-43. Paul Knight and Charles Leeper, the Chief and Deputy Chief of Prosecutions, were not impressed, concluding that, while Moore and REI "played 'hardball' with the Postal Service," the evidence that Moore and Reedy had acted criminally or known about the payments to Voss was "not particularly strong," and the case against Moore was especially weak. J.A. 447, 453, 455; Pet. App. 26a. While this analysis might ordinarily have been sufficient to put a stop to a law enforcement officer's personal vendetta, the Postal Inspectors had the good fortune to be supported in their cause by an Assistant U.S. Attorney, Joseph Valder, with an improper agenda of his own. Specifically, Valder admitted during the course of the investigation—in the presence of, and without contradiction by, two of the Postal Inspectors—that "the merits of the case or whether [Moore] w[as] guilty or not did not concern him" because he just wanted to "win the case" and "get a track record or some notoriety which would help him obtain a good position in private practice." J.A. 442, 445-46. With the support of Valder, the Postal Inspectors continued to push for Moore's indictment, *see*

J.A. 242-43, 467-73, and, as a result of this "unusual prodding," the U.S. Attorney's office ultimately relented and approved the prosecution. Pet. App. 27a.

Misconduct Before the Grand Jury — Lacking probable cause, the Postal Inspectors "behaved . . . as if their case needed bolstering" by tampering with the grand jury process. Pet. App. 27a. Specifically, the inspectors went to improper and extraordinary lengths to keep the grand jury from hearing witnesses say that Moore was innocent—in violation of Justice Department guidelines requiring presentation of exculpatory evidence to the grand jury, *see* Department of Justice, *United States Attorneys' Manual* § 9-11.233 (1988). For example, certain coconspirators and other witnesses testified, not by way of ordinary questions and answers, but by reading carefully scripted statements that the Postal Inspectors prepared in order to prevent the witnesses from telling the grand jury that neither Moore nor anyone else at REI knew about the payments to Voss. J.A. 178-81, 211-13, 253-66. In one instance, Valder left a witness, Frank Bray, and his lawyer, now-district judge Ellen Huvelle, in the hands of the Postal Inspectors, who refused to permit Mr. Bray and Ms. Huvelle to correct the scripted statement that was to be read to the grand jury the next day. J.A. 266-74, 292-99, 374-79, 418-27; Pet. App. 27a.

The Postal Inspectors also attempted to coerce another witness, Spartin, into incriminating Moore, even taking the unprecedented step of participating in a preplanned ploy whereby as many as ten inspectors surrounded Spartin while his immunity agreement was torn in two. J.A. 217-18, 403-18. When Spartin refused to capitulate, the Postal Inspectors improperly showed him the scripted grand jury statements of his coconspirators in order to elicit an "opinion," contrary to his personal knowledge, that Moore knew that Voss was receiving money from Gnau; the inspectors then presented this "opinion" to the grand jury as evidence of Moore's guilt. Pet. App. 25a-26a; J.A. 221-24, 226, 380-92, 428-30.

These tactics had their desired effect: in reliance on the Postal Inspectors' distorted presentation of the case, the grand jury indicted Moore, Reedy and REI. The indictment satisfied a principal goal of the Postal Inspectors' retaliatory agenda by causing REI to be banned from participating in the scanner procurement and foreclosing REI's chances of obtaining the lucrative scanner contract. J.A. 244, 345.

6. Moore's Acquittal. With the Postal Inspectors' retribution complete, the house of cards they had constructed collapsed. After the government presented its case for six weeks, Moore, Reedy and REI filed motions for acquittal, which Judge Revercomb granted due to lack of evidence:

> The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points towards innocent conduct of the Defendants.

Recognition Equip., 725 F. Supp. at 587-88. There was, the court noted, a "complete lack of direct evidence to suggest that the Defendants knew of the illegal payoff scheme"; indeed, "[a]ll of the unindicted coconspirators who testified expressly stated that they never told Moore or Reedy about the payments from Gnau to Voss." *Id.* at 596. Consequently, even viewed in the light most favorable to the government, the government's evidence did not "support a reasonable inference that the Defendants knew" of the conspiracy they had allegedly joined. *Id.* at 589.

7. Moore's Lawsuit. Despite being acquitted, Moore was financially devastated by his wrongful indictment and prosecution. The mere fact of the indictment caused REI to be debarred from the scanner procurement, and Moore was suspended from REI pursuant to a "cleansing plan" that the Postal Inspectors formulated and imposed on REI. J.A. 244,

345. The publicly traded company that Moore had rescued from the brink of bankruptcy saw its fortunes decline, and it eventually was acquired by a smaller competitor, leaving Moore no job to return to after his acquittal. J.A. 346. Moore also suffered the career equivalent of the death penalty. Before his indictment, as a well-respected executive in the high-tech industry, Moore was on the path to become CEO of one of the nation's biggest technology companies. J.A. 346-47. As a result of the indictment, however, no company would even consider him for such a position. *Id.*

Moore sought compensation for these injuries, asserting in federal court in Texas, *inter alia*, a *Bivens* claim against the Postal Inspectors and Valder for violation of Moore's First Amendment rights. J.A. 46. In a separate action, Moore asserted, *inter alia*, a claim for malicious prosecution against the United States under the Federal Tort Claims Act ("FTCA"). Moore's lawsuits were transferred to the District of Columbia and consolidated. Valder was eventually dismissed from the case on the grounds of absolute prosecutorial immunity, Pet. Br. at 9, while Moore was permitted to conduct "limited discovery" that was "tailored to the issue of whether the postal inspectors had the requisite retaliatory motive." Mem. Op. of Feb. 5, 1998, at 29.

Following this limited discovery, Petitioners and the United States filed separate motions for summary judgment. Petitioners argued that they were entitled to qualified immunity on Moore's First Amendment claim because "Moore did not have a clearly established right to be free from all prosecution tinged by alleged retaliatory motive; he had a right to be free only from those prosecutions both tinged by retaliatory motive and that otherwise could not appropriately be brought." Mem. Supp. Postal Inspectors' Mot. Summ. J. at 25. Petitioners also argued that Moore had failed to come forward with sufficient evidence to create triable issues of fact on retaliatory motive and causation. *See id.* at 34-38. For its part, the United States argued that it was

entitled to summary judgment on Moore's FTCA claim for malicious prosecution because, *inter alia*, Moore could not establish the absence of probable cause, which the D.C. Circuit had earlier held was an element of the FTCA claim. *See* Mem. Supp. United States' Mot. Summ. J. at 11-17.

The district court denied both motions, finding that "[t]here are material[] facts in dispute." Pet. App. 42a.[3] Petitioners, but not the United States, appealed, limiting their argument—because of the interlocutory posture of the appeal—to the contention that they are entitled to qualified immunity from suit because Moore's rights were not violated. The court of appeals affirmed. It first concluded that circuit precedent established that a prosecution procured in retaliation for the exercise of free speech violated the First Amendment whether or not there was probable cause. Pet. App. 13a-14a. Explaining the rationale for this precedent, the court stated that this Court's decision in *Wayte v. United States*, 470 U.S. 598 (1985), made clear that a decision to prosecute could not be based on the exercise of constitutional rights. The court also found support for its logic in *Crawford-El v. Britton*, 523 U.S. 574 (1998), citing that decision's holding that governmental officials acting with constitutionally improper motives are not entitled to immunity just because the retaliatory conduct is objectively reasonable. Pet. App. 19a. "Other constraints identified in *Crawford-El*—procedural mechanisms for limiting discovery and facilitating summary judgment, as well as the

[3] The district court's decision means that the record is sufficient to permit a reasonable jury to conclude that Petitioners' actions were taken to retaliate against Moore for his speech and lobbying activities and that the prosecution would not have occurred but for that improper motive. In addition, by rejecting the United States' motion for summary judgment, the district court necessarily found the record sufficient to permit a fact-finder to conclude that there was no probable cause to prosecute Moore.

opportunity to show the prosecution would have happened anyway—may screen out baseless motive claims without precluding recovery in cases where officers pursue retaliatory charges they would not have undertaken but for their unconstitutional animus." *Id.* (citations omitted).

The court of appeals emphasized that its holding was "limited," however, because the existence of probable cause will usually be sufficient to establish that the prosecution would have occurred in any event, thereby breaking the chain of causation. Pet. App. 19a. The instant case, by contrast, constitutes a "rare circumstance" where there was both "strong evidence of retaliatory motive" (*id.* at 20a) that "comes close to the proverbial smoking gun" (*id.* at 28a) and "weak indicators of probable cause" (*id.* at 20a) coupled with other considerations (such as complexity and cost) "that, under normal circumstances, might weigh against prosecuting a marginal case" (*id.* at 28a). As a result, the court was unable to conclude that Moore would have been prosecuted but for Petitioners' desire to retaliate against his speech and lobbying. *Id.*

Finally, in a portion of its holding not before this Court, *see infra* note 7, the court of appeals held that Moore's First Amendment right to be free from retaliatory prosecution, even if backed by probable cause, was clearly established in the D.C. Circuit at the time of Petitioners' misconduct. Pet. App. 29a-31a. As a result, Petitioners had fair warning that their conduct was unconstitutional and accordingly were not entitled to immunity from suit. Because the court of appeals denied the qualified-immunity defense on this basis, it did not reach the question whether, contrary to the conclusion of the district court (*see supra* p. 11 & note 3), there had been probable cause to prosecute Moore. Pet. App. 12a.

SUMMARY OF THE ARGUMENT

This case presents a narrow and straightforward question: does the First Amendment forbid law enforcement officials

from procuring an indictment and prosecution that would not otherwise have been brought for the purpose of retaliating against an individual's lobbying and public criticisms of the government, regardless of whether there is probable cause for the prosecution? If it does, then Petitioners violated Moore's clearly established First Amendment rights, and the courts below properly rejected Petitioners' qualified-immunity defense. Moreover, even if the First Amendment protects against such conduct only in the absence of probable cause, Petitioners are still not entitled to qualified immunity because they did not believe—and no reasonable officer could have believed—that there was probable cause.

1. It has long been settled that the First Amendment right to freedom of speech is violated when the government subjects an individual to adverse action in retaliation for his public criticisms of, and lobbying against, government policy, even if the adverse action would have been proper if taken without retaliatory purpose. As this case comes before the Court, it must be assumed—as the record evidence confirms—that Petitioners targeted Moore because of his speech and that Moore would not have been prosecuted but for Petitioners' retaliatory motive. Because this retaliation was patently unreasonable in light of the well-established First Amendment prohibition against it, Petitioners are not entitled to qualified immunity.

2. This conclusion is not altered by the fact that Petitioners' retaliation took the form of the procurement of a criminal prosecution. If the Constitution generally prohibits the government from acting by reason of an unconstitutional motive even if it could have taken the same action absent that illicit intent, as is unquestionably the case, then it makes no sense to say that the existence of a constitutional violation depends on the specific nature of the improperly motivated act. That is why this Court's precedents make clear that the decision to bring a prosecution backed by probable cause—like any other official decision—may not be based on a

constitutionally prohibited reason like race or the exercise of free-speech rights. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court rejected as "unprecedented" the absolutist proposal to confer qualified immunity for unconstitutionally motivated conduct that would have been valid absent an illicit purpose, and it should likewise reject Petitioners' more radical assertion that such conduct does not violate the Constitution.

None of Petitioners' arguments to the contrary has merit. Petitioners contend that First Amendment violations should be treated the same way as racially motivated prosecutions under the Equal Protection Clause, and that precedents concerning the latter require, as a "screening mechanism," "some objective showing" equivalent to the absence of probable cause. That is incorrect. This Court's Equal Protection precedents establish that a racially discriminatory prosecution violates the Constitution *even if the prosecution is supported by probable cause*. Those precedents similarly show that what Petitioners characterize as an objective screening mechanism is nothing more than the well-settled requirement, applicable in both the Equal Protection and First Amendment contexts, that, for there to be a constitutional violation, the constitutionally prohibited animus, rather than some other factor such as neutral application of the law, must be the reason for the prosecution. Any contrary conclusion would represent a radical departure from settled law. Particularly in light of the ease with which law enforcement officers can uncover probable cause in the conduct of virtually everyone, Petitioners' rule would give government officials a license to discriminate and retaliate against individuals based on their protected political speech and their race.

Nor, contrary to Petitioners' contention, should the First Amendment right to be free from a retaliatory prosecution be defined by reference to the common-law tort of malicious prosecution. While the common law is sometimes used to

interpret terms of art used in the Constitution, and in some circumstances may also be relevant to the scope of *remedies* available under *Bivens* and 42 U.S.C. § 1983, the contours of specifically enumerated constitutional rights do not depend upon the technical niceties of torts recognized at common law. It is therefore completely at odds with this Court's settled approach to constitutional interpretation to search for a common-law tort analogy to the particular method used to deprive an individual of his constitutional rights and to then use the definition of that common-law tort to contract the scope of *the constitutional right itself.* The tort of malicious prosecution has nothing to do with—and therefore can shed no light on the meaning of—the right to freedom of speech.

Finally, Petitioners put forth a series of policy arguments relating to the relative competency of the judicial and executive branches and the need for a substantive rule of constitutional law that will avoid undermining prosecutorial effectiveness and chilling law enforcement. None of these policy considerations warrants reversal here because numerous adequate safeguards already exist to weed out non-meritorious claims and protect law enforcement officials from frivolous claims. Indeed, the Court in *Crawford-El* squarely held that similar policy concerns do not justify even a narrower *procedural* "screening mechanism" in a context where the potential litigation burdens on public officials are far greater than those present here.

3. There is also no merit to Petitioners' alternative rationale, offered only in passing, that the decision below should be reversed because the absence of probable cause is an element of the claim for damages authorized by *Bivens*. As Petitioners concede, this argument—which was not raised below and is outside the scope of the Petition for Certiorari—has nothing to do with their qualified-immunity defense or the scope of the First Amendment right at issue, but rather is a separate and distinct argument about the availability of a damages remedy for the violation of that

right. Because this is an interlocutory appeal under the "collateral order" doctrine, the Court lacks pendent appellate jurisdiction to address that separate argument.

In any event, the absence of probable cause is not an element of Moore's *Bivens* claim for violation of the First Amendment. Petitioners' argument rests on the mistaken assertion that this claim must slavishly incorporate the elements of the common-law tort of malicious prosecution. To the contrary, while the common law may sometimes provide guidance for shaping the remedy available under *Bivens* and § 1983, this is so only where the interests protected by a particular branch of the common law of torts parallel closely the interests protected by the constitutional right at issue. Because the interests protected by the First Amendment—freedom from punishment meted out *because of* one's speech—are fundamentally different than those protected by the common-law tort of malicious prosecution—protection from *unjustifiable* prosecutions—there is simply no warrant for relying on the malicious prosecution tort to shape the contour of the constitutional tort remedy for the First Amendment violation at issue here.

4. Even if Petitioners were correct that they *would be* entitled to qualified immunity *if* probable cause existed, they would still not be entitled to immunity here because they did not believe—and no reasonable officer could have believed—that there was probable cause to prosecute Moore. Although this Court should leave this issue, which was not decided below, for the court of appeals on remand, if it chooses to reach it, a review of the record shows that the pieces of disputed and ambiguous "evidence" cobbled together by Petitioners do not support the inference that Moore even knew of—let alone violated the law by agreeing to join—the conspiracy in which he allegedly took part, especially when that purported evidence is viewed together with the exculpatory evidence that Petitioners deliberately concealed from the grand jury.

ARGUMENT

The court of appeals properly affirmed the denial of Petitioners' motion for summary judgement based on the defense of qualified immunity. The court correctly held that the First Amendment protects the right to be free from otherwise valid official acts taken in retaliation for political speech and lobbying, and that this right extends to freedom from a retaliatory criminal investigation and procurement of a prosecution that would not otherwise be brought, whether or not the prosecution is backed by probable cause. Because there is no basis in law, logic or policy for creating a "unique rule" of First Amendment law in the context of retaliatory investigations and prosecutions, and because, in any event, there was no probable cause for the charges against Moore, Petitioners are not entitled to summary judgment.

I. PETITIONERS VIOLATED MOORE'S FIRST AMENDMENT RIGHTS BY RETALIATING AGAINST HIM FOR HIS PUBLIC CRITICISMS OF, AND LOBBYING AGAINST, THE U.S. POSTAL SERVICE

1. There is no question that Moore's efforts to change Postal Service policy through public criticism and political lobbying, *see supra* pp. 3-4, fall squarely within the core of activities protected by the First Amendment. *See, e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). There is also no question that the evidence in this case presents a chilling picture of law enforcement agents who went on an investigative rampage to turn Moore's public criticisms of their agency into reasons to indict him. *See supra* pp. 4-9. Indeed, as the court of appeals observed, the "evidence of [Petitioners'] retaliatory motive comes close to the proverbial smoking gun." Pet. App. 28a.

It is also settled that the First Amendment does more than merely disable Congress from directly regulating protected speech; it also prohibits government officials from subjecting

a citizen to adverse action in "retaliation for protected speech." *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). As the Court has explained, "such retaliation offends the Constitution [because] it threatens to inhibit exercise of the protected right." *Id.* at 588 n.10.[4] And retaliation for protected speech violates the Constitution even if the adverse action would have been legitimate if taken for different reasons. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (although teacher was terminable at will, his rights were violated "if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons," the benefit may not be denied "because of his constitutionally protected speech").

These principles, moreover, are simply applications in the First Amendment context of the general rule that any official act that would be proper if taken without an illicit motive will violate the Constitution if it is taken with a constitutionally prohibited motive. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65

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[4] *See also Rutan v. Republican Party*, 497 U.S. 62, 75 n.8 (1990) ("the First Amendment [protects against] even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights" (internal quotation marks omitted)); *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights"); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958).

(1977).[5] Notably, these principles have been directly applied to criminal prosecutions. *See, e.g., Wayte v. United States*, 470 U.S. 598, 608 (1985) ("the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights" (citations and internal quotation marks omitted)); *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (same); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree . . . that the Constitution prohibits selective enforcement of the law based on considerations such as race.").[6]

2. In light of this settled law, no officer could reasonably have believed it consistent with the First Amendment to investigate Moore and procure his prosecution in retaliation for protected political speech, whether or not there was probable cause for the prosecution. *See Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) ("anyone who takes an oath of office knows—or should know—that" it is wrong to retaliate against an individual for exercising his constitutional rights). As a result, Petitioners are not entitled

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[5] As the court below recognized, an unconstitutionally motivated act is not invalid if the same act would have been taken had the impermissible purpose not been considered. Pet. App. 19a-20a; *Mt. Healthy*, 429 U.S. at 287; *Arlington Heights*, 429 U.S. at 270 n.21. Of course, arguing, as Petitioners do here, "that the same decision would have been *justified* . . . is not the same as proving that the same decision would have been *made*." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995) (emphasis added, internal quotation marks omitted, ellipsis in original).

[6] The lower courts, too, have long recognized that retaliatory prosecution violates the Constitution "*regardless* of whether valid convictions conceivably could be obtained." *Lewellen v. Raff*, 843 F.2d 1103, 1109-10 (8th Cir. 1988) (internal quotation marks omitted); *see also* Pet. App. 12a-15a; *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1072 (9th Cir. 2004); *Smith v. Meese*, 821 F.2d 1484, 1491-92 & n.5 (11th Cir. 1987); *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981).

to qualified immunity from Moore's *Bivens* claim. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).[7]

This Court's decision in *Crawford-El* makes clear, moreover, that the doctrine of qualified immunity would not protect Petitioners even if they could show—contrary to the record evidence, *see infra* Part IV—that there was probable cause to prosecute Moore. *Crawford-El* involved a claim by a prisoner that his belongings had been diverted to a family member in retaliation for protected speech. 523 U.S. at 574. Notwithstanding the trivial nature of this alleged "deprivation," the undeniable problem of frivolous prisoner litigation and the burden placed on prison officials responding to accusations of improper motive, the Court refused to impose any special heightened pleading or proof standards for motive-based constitutional tort claims. *Id.* at 592-97. The Court held further that an officer defending against such claims is not entitled to qualified immunity simply because the officer's conduct was "objectively valid, regardless of improper intent." *Id.* at 594 (internal quotation marks omitted); *see also id.* at 602 (Rehnquist, C.J., dissenting) (reasoning that officer should not be entitled to immunity if plaintiff can show through objective evidence that alleged lawful reason for officer's action "is actually a pretext"). The creation of such screening devices to protect officers against motive-based claims, the Court concluded, would improperly impede the vindication of First

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[7] Appropriately relying on circuit precedent, *see Hope v Pelzer*, 536 U.S. 730, 741-46 (2002); *United States v. Lanier*, 520 U.S. 259, 268-69 (1997), the court of appeals held that, at the time of Petitioners' conduct, Moore's right to be free from a retaliatory prosecution, whether or not backed by probable cause, was clearly established in the D.C. Circuit, where the conduct occurred. Pet. App. 29a-31a. Because this Court limited its grant of certiorari to the first question presented, *see* 125 S. Ct. 2977 (2005) (Mem.); Pet. at I, the correctness of this aspect of the decision below is not at issue here.

Amendment rights through constitutional tort actions. *Crawford-El*, 523 U.S. at 594-95. For the same reason, no special rule of immunity can be justified here. Just as the objective reasonableness of the defendant's acts in *Crawford-El* did not entitle her to qualified immunity from the prisoner's claim that the acts were taken with an unconstitutional motive, so, too, the alleged objective reasonableness of Petitioners' acts here (measured by whether there was probable cause to prosecute Moore) does not entitle them to qualified immunity from Moore's claim that he was prosecuted in retaliation for his protected speech.

II. THE PROCUREMENT OF A PROSECUTION IN RETALIATION FOR PROTECTED SPEECH VIOLATES THE FIRST AMENDMENT EVEN IF THERE IS PROBABLE CAUSE

Petitioners do not challenge the general rule, discussed above, that the First Amendment is violated when government officials take otherwise valid adverse action against an individual in retaliation for speaking and lobbying about matters of public concern. Indeed, Petitioners appear to concede, as they must, that they would have violated the First Amendment if they had, for the same retaliatory reasons that motivated their procurement of Moore's indictment, directly barred Moore from competing for Postal Service business (which, as noted above, *see supra* pp. 4, 9, was a principal objective of their retaliation), *cf. Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 678-79 (1996), or even if they had simply misdirected his mail, *cf. Crawford-El*, 523 U.S. at 578. Yet, according to Petitioners, because their retaliation constituted the more egregious act of procuring a criminal prosecution, *there was no First Amendment violation at all* if probable cause existed. As Petitioners concede, their argument boils down to a plea for a "*unique rule* [of First Amendment law] *in the prosecutorial context*." Pet. Br. at 31 (first emphasis added).

As an initial matter, Petitioners completely fail to reconcile their proposed rule with this Court's refusal in *Crawford-El* to immunize motive-based First Amendment violations merely because the challenged action would have been objectively valid if taken without improper intent. *See supra* pp. 20-21. Petitioners contend that *Crawford-El* is inapposite because it rejects a *procedural* rule of qualified immunity to protect officials from motive-based constitutional claims, while here Petitioners seek to shield officials from such claims by modifying the *substance* of the First Amendment to authorize speech-based retaliation in the prosecutorial context. *See* Pet. Br. at 34 n.9; Cert. Reply at 2-3. This argument is premised on the strange notion that concerns about litigation burdens on government officials somehow justifies judicial alteration of the substantive scope of the First Amendment even though the Court has held that those very same concerns do not justify altering judge-made standards of qualified immunity that are based, in part, on common-law principles. In fact, it should go without saying that justifications that are insufficient to alter the elements of a judge-made qualified-immunity defense cannot possibly suffice to alter the commands of the Constitution.[8]

Petitioners' argument is also conceptually incoherent. Because the Constitution prohibits the government from acting with an unconstitutional motive even if it could have done the same thing absent that illicit intent, it makes no sense to say that the existence of a constitutional violation

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[8] Petitioners nevertheless expressly disclaim any argument that the Court should revisit *Crawford-El* or create an exception, in the prosecution context, to its holding. *See* Pet. Br. at 34 n.9; Cert. Pet. Reply at 2-3. As a result, such arguments may not be invoked as a basis for reversing the decision below. *See Hagen v. Utah*, 510 U.S. 399, 410 (1994) ("we see no reason to consider an argument that petitioner not only failed to raise, but also expressly refused to rely upon in seeking a writ of certiorari").

depends on the specific nature of the improperly motivated act. Unsurprisingly, Petitioners fail to cite any case even suggesting that an unconstitutional-motive claim should be analyzed in this novel manner. *Cf. Umbehr*, 518 U.S. at 678 ("if [a state entity] had exercised sovereign power against [an individual] as a citizen in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest"). Moreover, Petitioners completely miss the mark in arguing (Pet. Br. at 33-34) that precedents such as *Mt. Healthy* prohibiting improperly motivated public-employment decisions do not provide appropriate guidance in the context of retaliatory investigations and prosecutions. To the extent there is a relevant distinction, it cuts *against* Petitioners, because, with respect to the authority to restrict speech, "the government as employer . . . has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.); *see also Umbehr*, 518 U.S. at 676-78.

Moreover, by focusing on the special considerations purportedly applicable to a prosecutor's decision to bring a case, Petitioners ignore the fact that the misconduct at issue in this case primarily involves the investigatory activities of law enforcement officers whose improper acts preceded (and perverted) the decision to prosecute. In all events, even with respect to decisionmaking by prosecutors, Petitioners' proposed "unique rule" is directly foreclosed by precedents of this Court. These teachings make clear that, like any other exercise of official discretion, the decision to prosecute is "subject to constitutional constraints," *United States v. Batchelder*, 442 U.S. 114, 125 (1979), and "may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights," *Wayte*, 470 U.S. at 608 (citations and internal quotation marks omitted); *see also supra* pp. 18-19.

Petitioners nonetheless offer three reasons for denying constitutional protection to an officer's improperly motivated investigation and procurement of a criminal prosecution for which there is claimed to be probable cause: (1) an alleged need to reconcile the Court's First Amendment jurisprudence with its Equal Protection jurisprudence (Pet. Br. at 21-24); (2) the fact that the absence of probable cause is an element of the common-law tort of malicious prosecution (*id.* at 24-30); and (3) the purported need to protect the exercise of prosecutorial discretion from judicial review (*id.* at 19-21, 30-34). All of these reasons lack merit.

1. The fundamental premise of Petitioners' argument is that the First Amendment standards governing prosecutions procured because of a citizen's speech should be the same as the Equal Protection standards governing prosecutions brought because of a citizen's race. Pet. Br. at 21-24. As Petitioners aptly state, "[t]here is no basis for treating these similar types of constitutional challenges to prosecution so differently." Pet. Br. at 23. Petitioners then make the astonishing contention that, in the context of racial discrimination under the Equal Protection Clause, a minority "claimant cannot establish selective prosecution merely by showing that his race was the but-for cause of the prosecution," but rather, under *United States v. Armstrong*, 517 U.S. 456 (1996), must make some "objective" showing in addition to the fact that he has been singled out for adverse action solely because of his race. Pet. Br. at 15. Building on the "premise" that prosecutions brought for no reason other than racial animus do not constitute Equal Protection violations, Petitioners then argue that prosecutions procured for no reason other than punishing constitutionally protected speech do not violate the First Amendment, unless the claimant can also "objectively" show the absence of probable cause.

It is quite clear, however, that a racially motivated criminal prosecution does violate the Equal Protection

Clause *even if the prosecution is supported by probable cause*. As far back as *Yick Wo v. Hopkins*, for example, this Court found a substantive violation of the Equal Protection Clause based on racially motivated prosecutions of individuals who had indisputably violated a facially neutral and reasonable law prohibiting laundries from operating in dangerous wooden buildings without a license. 118 U.S. 356, 373-74 (1886). Similarly, *Armstrong* expressly relied on *Yick Wo* and discussed the requirements of an Equal Protection Claim in a context where it was undisputed (and indisputable) that there was probable cause for the drug prosecutions at issue. *See* 517 U.S. at 458-59. Thus, it is the *adoption* of Petitioners' "unique rule" which would destroy the current symmetry between the First Amendment and the Equal Protection Clause in the prosecutorial context.

In contrast, the decision below creates no disconnect between the standards governing racially discriminatory prosecutions and those governing speech-based retaliatory prosecutions because, contrary to Petitioners' mind-boggling proposition, a deliberate policy of prosecuting citizens of only one race for certain crimes *would* violate the Equal Protection Clause. Petitioners blithely assert that *Armstrong* creates a special Equal Protection rule in the context of criminal prosecutions permitting race-based discriminatory treatment absent some additional "objective showing" equivalent to the absence of probable cause. Pet. Br. at 24. But *Armstrong* clearly held that "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race,'" 517 U.S. at 464 (quoting *Oyler*, 368 U.S. at 456). *Armstrong* even makes clear that its analysis is based, not on any special rules for the prosecutorial context, but on "ordinary equal protection standards." *Id.* at 465 (quoting *Wayte*, 470 U.S. at 608). This is why *Armstrong* justified its ruling by extensively analyzing and applying the analysis in *Hunter v. Underwood*, 471 U.S. 222 (1985), and *Batson v. Kentucky*, 476 U.S. 79 (1986)—two ordinary Equal

Protection cases outside the criminal prosecution context. 517 U.S. at 467-68.

To be sure, as Petitioners note, *Armstrong* held that "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* at 465. But, as the opinion itself noted, this "similarly situated requirement" is one of the "ordinary equal protection principles" under which a showing of discriminatory effect is a prerequisite to showing differential treatment *based on race*. *Id.* At the risk of belaboring the obvious, racial-minority claimants cannot plausibly show that they have been treated differently because of their race if similarly situated non-minority individuals were treated in the same way. If San Francisco had applied its municipal ordinance to non-Chinese laundry operators in numbers proportionate to adversely affected Chinese operators, or if a proportionate number of white voters had been excised from Tuskegee, Alabama through its redrawing of municipal boundaries, then the plaintiffs in the seminal cases of *Yick Wo* and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), would have had no claim of race-based disadvantage. Similarly, the fact that the government prosecutes an individual of a particular race does not suggest that the prosecution was brought because of that individual's race; a showing of differential, more favorable treatment of persons of a different race is required in order to conclude that a discriminatory purpose was the reason for the prosecution.[9]

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[9] The need for such evidence of "discriminatory effect" is particularly obvious where, as in *Armstrong*, the claimant alleges a clear *pattern* of discriminatory prosecutions. *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 334-36 (1977). "This is not to say," however, "that a consistent pattern of official racial discrimination is a necessary predicate to a violation of the Equal Protection Clause" because "a single invidious

For this reason, under standard Equal Protection analysis applicable in all contexts, a showing of discriminatory effect is generally an "important starting point" for showing that the adverse action furthered a discriminatory purpose. *Arlington Heights*, 429 U.S. at 266. *Armstrong* simply applies this general principle to the prosecution context by requiring evidence of discriminatory effect to establish the constitutional violation, *i.e.*, that there has been purposely disadvantageous treatment because of race. It does not impose some *additional* "screening mechanism" (Pet. Br. at 22) on top of the normal Equal Protection showing that claimants must satisfy to establish a constitutional violation in the prosecutorial context.[10] Stated another way, the absence of such effect renders irrelevant any alleged racial prejudices held by prosecutors because any such *animus* has not been translated into negative government *action* based on race, so there is no point in inquiring further into the circumstantial evidence of racial prejudice.

Petitioners do not, of course, seek to transfer the "discriminatory effect" requirement of Equal Protection law to the First Amendment context where it has never been applied, because viable First Amendment claims, unlike *equal* protection challenges, are not necessarily or typically

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discriminatory governmental act" is impermissible, even if the government actors refrained from "such discrimination in making other comparable decisions." *Arlington Heights*, 429 U.S. at 564 n.14.

[10] Any ambiguity on this point is eliminated by the fact that the *Armstrong* Court reserved, at the United States' urging, the question "whether a defendant must satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose.'" 517 U.S. at 469 n.3 (quoting Brief for United States at 15). The fact that the Court did so further establishes that the "similarly situated" requirement was imposed as an evidentiary prerequisite to finding that the prosecution was based on race, not as an additional objective "screening mechanism" in the prosecutorial context.

premised on *unequal* treatment. As the Court noted in *Crawford-El*, there is an obvious difference between an Equal Protection violation—involving an "intent to disadvantage all members of a class that includes the plaintiff"—and a First Amendment violation, such as the one in this case, where the government acts with the intent of "deterring public comment on special issues of public importance." 523 U.S. at 592. In the latter type of situation, where a lone whistleblower or lone public critic (like Moore) has been singled out for mistreatment because of a retaliatory animus directed specifically at him and under circumstances peculiar to him, there often are no "similarly situated" individuals and, more generally, it would be difficult to even articulate what is meant by "discriminatory effect" in this context. Accordingly, to ensure that the improper animus was translated into government action in these situations, courts generally require, as the court below required here, evidence that the claimant would not have been punished but for his protected speech. Pet. App. 15a-16a, 28a. This element of causation serves the same purpose in a First Amendment case of individualized retaliatory animus that the "similarly situated" requirement serves in a case of alleged systematic racial discrimination: both showings establish that the challenged conduct is "attribut[able] . . . to improper consideration of a discriminatory purpose." *Arlington Heights*, 429 U.S. at 270 n.21. No other "objective showing" is required—and certainly not one (the absence of probable cause) that, as explained above, has *never* been a prerequisite for an Equal Protection violation.

As the foregoing analysis shows, acceptance of Petitioners' interpretation of *Armstrong*, and its "extension" to the First Amendment context, would be at war with fundamental constitutional norms. Petitioners' rule would provide a license for federal and state law enforcement officers and prosecutors to single out political opponents or racial minorities for retaliatory or racially motivated investigations and prosecutions. As Petitioners themselves

candidly concede, there is no empirical basis for assuming "that almost all potential prosecutions that satisfy the probable cause standard are, in fact, brought," because, for "less serious" crimes, a "finding of probable cause would be far from a sufficient basis for expending prosecutorial resources." Pet. Br. at 32; *see also* Robert Jackson, *The Federal Prosecutor*, Address Delivered at the Second Conference of United States Attorneys, April 1, 1940 ("With the law books filled with a great assortment of crimes, [there] is a fair chance of finding at least a technical violation of some act on the part of almost anyone."). Consequently, under Petitioners' rule, the government could, free from any constitutional restraint, engage in a naked policy of prosecuting only political opponents of the President or the District Attorney for those less serious offenses that are normally not prosecuted. In the Equal Protection context, it would authorize investigators and prosecutors to engage in a pattern of official harassment of minority neighborhoods, through selective prosecution for minor offenses that are tolerated in white enclaves.

In short, Petitioners' rule would "permit[] and encourage[] an arbitrary and discriminatory enforcement of the law" by "furnish[ing] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (internal quotation marks omitted). And there is no reason to think it would stop there: if the Court accepts Petitioners' invitation to determine the existence of a motive-based constitutional violation by reference to the context in which the improperly motivated act occurs, courts will have to confront whether a multitude of other improperly motivated core executive functions—such as discriminatory or retaliatory decisions to arrest, to audit tax returns, and to impose prison discipline—are similarly outside the scope of the Constitution's prohibitions whenever they would have been objectively

valid if taken for other reasons. The Court should not open the door to authorizing such political and racial profiling.

2. Petitioners also contend that the First Amendment right to be free from a retaliatory prosecution should be defined by reference to the common-law tort of malicious prosecution. In Petitioners' view, because the absence of probable cause is generally an element of that tort, probable cause must be absent for a retaliatory prosecution to violate the First Amendment. Pet. Br. at 24-30.

Moore, however, is not asserting a malicious prosecution claim against Petitioners, and Petitioners' argument ignores this Court's repeated admonitions against conflating the differing and distinct obligations of the Constitution and state tort law. Specifically, just as the commission of a common-law tort does not necessarily rise to the level of a constitutional violation simply because the tortfeasor is a government official, *see, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986); *Baker v. McCollan*, 443 U.S. 137, 146 (1979), so too do the contours of specifically enumerated constitutional rights not depend upon the technical niceties of torts recognized at common law. Rather, "[t]he validity of the claim [for deprivation of a constitutional right] must . . . be judged by reference to the specific constitutional standard which governs that right"—here the standards governing the right to freedom of speech. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see also Bivens*, 403 U.S. at 394 ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."); *Albright v. Oliver*, 510 U.S. 266, 277 n.1 (1994) (Ginsburg, J., concurring) (explaining that constitutional rights are "not tied to the formal categories and procedures . . . of the common law"). "It is no reflection on either the breadth of the United States Constitution or the importance of

traditional tort law to say that they do not address the same concerns." *Daniels*, 474 U.S. at 333.

To be sure, this Court has, at times, looked to the common law in attempting to determine the content of constitutional provisions, including the First Amendment. *See* Pet. Br. at 28 & n.7 (citing cases). But Petitioners fundamentally misconstrue the nature of this endeavor. It is one thing, and entirely appropriate, to look to the common law to determine the contemporaneous understanding of particular terms of art used in the Constitution, such as "freedom of speech." *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in the judgment). But it is quite another thing entirely, and completely inconsistent with this Court's settled approach to constitutional interpretation, *see supra* pp. 22-23, to search for a common-law tort analogy to the specific method that happened to be used to effect a particular deprivation of constitutional rights and to then use that analogy to contract the scope of *the constitutional right itself.* That is why, for example, the Court recognized in *Mt. Healthy* that a retaliatory discharge violates the First Amendment even where it does not constitute a wrongful termination under the common law. 429 U.S. at 283-84; *see also Bivens*, 403 U.S. at 394 & n.7 (explaining that limitations of liability for common-law trespass do not restrict the scope of the Fourth Amendment right). In short, the common-law tort of malicious prosecution has absolutely nothing to do with—and therefore can shed no light on the meaning of—the freedoms protected by the First Amendment.

Heck v. Humphrey, 512 U.S. 477 (1984), on which Petitioners rely, is not to the contrary. The question in *Heck* was whether a cause of action for damages pursuant to § 1983 could be brought for an allegedly unconstitutional conviction that had not been expunged. *Id.* at 486. Although the Court looked to the "favorable termination" element of the common-law tort of malicious prosecution for guidance,

it did so only in determining the scope of the constitutional tort remedy, and not in connection with any question about the scope of any constitutional right. *See Illinois v. Gates*, 462 U.S. 213, 223 (1982) ("The question whether [a] remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the . . . rights of the party seeking to invoke the [remedy] were violated by police conduct."); *Mt. Healthy*, 429 U.S. at 279, 281 (distinguishing between claim that defendant had immunity from suit and claim that defendant could not be liable under § 1983); *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478, 1489 (2005) ("[t]he substantive questions whether the plaintiff has any right or the defendant any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is" (internal quotation marks omitted)). Accordingly, *Heck* has no bearing at all on the question at issue here, *i.e.*, whether an improperly motivated prosecution violates the Constitution if it is backed by probable cause. (That is why the Court was able to set forth the elements of an Equal Protection violation in the context of prosecutions in *Armstrong* without any reference to the common law or citation to *Heck*. *See Armstrong*, 517 U.S. at 465.) Nor does *Heck* support Petitioners' alternative argument (Pet. Br. at 36) that the absence of probable cause is an element of the constitutional tort claim authorized by *Bivens*. *See infra* Part III.

3. Finally, Petitioners put forth a series of policy arguments relating to the relative competency of the judicial and executive branches and the need for a rule that will avoid undermining prosecutorial effectiveness and chilling law enforcement. Pet. Br. at 19-21, 30-34. Even if such policy considerations could somehow be relevant to determining the substantive scope of the First Amendment right, the short answer to Petitioners' objections is that this Court has never found these policy considerations sufficient to justify a special rule for Equal Protection violations in the prosecution

context. *See supra* pp. 25-27. Similarly, as described above, *see supra* p. 22, the Court in *Crawford-El* found these policy concerns insufficient to justify the creation of special screening mechanisms that "place[] a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved." *Crawford-El*, 523 U.S. at 593; *see also Johnson v. California*, 125 S. Ct. 1141, 1150 (2005) ("[m]echanical deference to [prison officials] would reduce [constitutional protections] to a nullity in precisely the context where [they are] most necessary" (internal quotation marks omitted)). In light of the well-recognized problems of frivolous prisoner litigation and the fact that this Court has continually recognized that prison officials are entitled to the same sort of "wide-ranging deference," *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977), and "broad discretion," *Shaw v. Murphy*, 532 U.S. 223, 232 (2001), that Petitioners claim here, no sensible balancing of factors could lead to a different conclusion in this case.

Even if the Court wished to consider Petitioners' policy arguments *de novo*, Petitioners have failed to make the case that a "unique rule" is necessary here. The relative competence of prosecutors and courts in determining whether a prosecution is justified (Pet. Br. at 19-20) simply has no bearing where *law enforcement officers* acting with retaliatory animus abused their powers when they investigated an individual and procured his indictment and prosecution. While it is true that the courts may need to examine some aspects of the *prosecutor's* decisionmaking as part of their inquiry into causation (Pet. Br. at 32), the purpose of doing so will not be to second-guess the prosecutor, but to determine whether an individual subjected to a retaliatory prosecution was actually injured thereby. The improperly motivated procurement of a prosecution is therefore a far cry from cases cited by Petitioners rejecting claims that certain tactics and discretionary decisions by prosecutors gave rise to violations of due process. *See, e.g.*,

United States v. Goodwin, 457 U.S. 368 380-81 (1982); *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977).

As for the alleged need to avoid unnecessary impairment of a core executive function (Pet. Br. at 20), Petitioners greatly overstate the cause for concern. As the court below recognized, the right to be free from retaliatory prosecutions, including ones backed by probable cause, will permit recovery only in "rare cases." Pet. App. 19a-20a. For one thing, the doctrine of absolute prosecutorial immunity ensures that prosecutors will almost always be entitled to immunity from suits for retaliatory prosecution in violation of the First Amendment. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). Indeed, the Assistant United States Attorney who prosecuted Moore successfully asserted a defense of absolute immunity in an earlier stage of this case. Pet. App. 81a-82a. For this reason, claims for retaliation in the prosecution context will be viable only where, as here, law enforcement officers had a substantial role in procuring the indictment or prosecution. Even then, such officers will be denied qualified immunity only where, as here, retaliatory animus is proven and it is clearly established that the speech in question is protected by the First Amendment.

Moreover, unlike the heightened pleading and proof standards rejected by the Court in *Crawford-El*, Petitioners' proposed rule is particularly ill-suited to screen frivolous claims from meritorious ones, given that the rule has no relation to the *sine qua non* of the constitutional violation—the officer's retaliatory motive. Petitioners' proposed rule would not even appreciably lessen the scope of review, for courts would still need to examine the often complex record compiled by investigators to determine whether probable cause existed. *See, e.g., infra* Part IV. Rather than require such a blunt instrument, the Court should recognize, as the court below did, that district courts can and should employ various procedural mechanisms, including those identified in *Crawford-El*, to screen out baseless motive claims and avoid

unnecessary and burdensome discovery *without* precluding recovery in cases where officers pursue retaliatory charges that would not otherwise have been brought but for their unconstitutional animus. Pet. App. 19a. These mechanisms include requiring plaintiffs to set forth more specific allegations and requiring, as occurred in this case, *see supra* p. 10, narrowly focused discovery, before any other discovery occurs, to resolve questions of retaliatory intent or to determine whether the plaintiff actually suffered injury or engaged in constitutionally protected behavior. *See Crawford-El*, 523 U.S. at 597-600. And, of course, "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Id.* at 600. In sum, "broad discretion in the management of the fact-finding process may be more useful and equitable to all the parties than the categorical rule" advocated by Petitioners here. *Id.* at 601; *see also Umbehr*, 518 U.S. at 678 ("[t]he dangers of burdensome litigation" can be minimized through "attentive application of the *Mt. Healthy* requirement of proof of causation," rather than "a *per se* denial of liability").

It is unsurprising, therefore, that trials of claims relating to retaliatory procurement of indictments and prosecutions are exceedingly rare. So far as Respondent has been able to discern, in the D.C., Sixth and Tenth Circuits—where it has long been established that the existence of probable cause does not foreclose a claim of retaliatory prosecution—there is *not a single case* of state or federal officials being subject to liability. Moreover, there is no indication that this Court's long-standing recognition that the Equal Protection Clause prohibits race-based decisions to bring prosecutions backed by probable cause has appreciably interfered with the prosecutorial function. *Cf. Payton v. New York*, 445 U.S. 573, 602 (1980) ("[i]n the absence of any evidence that effective law enforcement has suffered . . . such arguments of policy must give way to a constitutional command that we consider to be unequivocal").

Finally, Petitioners ignore an important flip-side to the policies of "effective law enforcement," namely, the need to provide protection for core constitutional guarantees. *See, e.g., Butz v. Economu*, 438 U.S. 478, 506-07 (1978). As explained above, *see supra* pp. 28-29, the need for vigilance is heightened, not lowered, in the context of criminal investigations, especially where law enforcement agents, rather than professional prosecutors, are the ones "picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." Jackson, *supra*; *cf. Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) ("Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation."). Indeed, there is no better example of Justice Jackson's paradigm of abuse than the instant case, in which Petitioners "pick[ed]" Moore because of his speech and "went to work[] to pin some offense on him." *See supra* pp. 4-9. Whether or not they found probable cause, the Constitution plainly prohibited Petitioners' conduct.[11]

III. THE ABSENCE OF PROBABLE CAUSE IS NOT AN ELEMENT OF MOORE'S *BIVENS* CLAIM

1. As an alternative rationale for reversal of the decision below, Petitioners argue in passing that the absence of probable cause is an element of Moore's *Bivens* claim for damages, and that Moore's evidence on that matter is insufficient to survive a motion for summary judgment. Pet. Br. at 17, 36-37. As Petitioners concede (*id.* at 37 n.12), this

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[11] The need for an effective *external* check against rogue officers is amply illustrated by the failure of internal checks in this case: the Postal Service not only failed to condemn Petitioners' conduct, but actually rewarded it with awards, plaques, cash bonuses, and instructor positions.

alternative assertion is not part of their qualified-immunity defense, but rather is a separate and distinct question about the availability of a remedy for the constitutional violation at issue. *See supra* pp. 31-32 (explaining distinction between rights and remedies); *Illinois v. Gates*, 462 U.S at 223; *Mt. Healthy*, 429 U.S. at 279, 281. As such, the Court may not address that argument here. It was not raised by Petitioners below,[12] and it is outside the scope of the Petition for Certiorari.[13] Most importantly, the Court lacks jurisdiction to consider it.

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[12] Petitioners' argument in both courts below was only that Petitioners are entitled to qualified immunity from suit. *See supra* pp. 10-11; Pet. App. 6a-7a. Accordingly, the separate claim that probable cause is an element of Moore's *Bivens* cause of action is not properly before this Court. *See Clingman v. Beaver*, 125 S. Ct. 2029, 2041 (2005) ("[w]e ordinarily do not consider claims neither raised nor decided below"); *Gates*, 462 U.S. at 223 (refusing to decide whether particular remedy for constitutional violation is appropriate where question raised was whether constitutional rights were violated); *Mt. Healthy*, 429 U.S. at 279-81 (refusing to consider whether § 1983 remedy could be sought against defendant where issue had not been preserved for appeal). In contending otherwise, Petitioners point to *Yee v. City of Escondido*, 503 U.S. 519 (1992), but *Yee* stands only for the proposition that a party is permitted to make new arguments in support of a preserved claim, not that he may assert an entirely separate and distinct defense to liability.

[13] The Petition for Certiorari made clear that the "ultimate question" for review in this case is "whether the officer is entitled to qualified immunity." Pet. at 24; *see also id.* (describing matter at issue as "question of qualified immunity"). Accordingly, whether the absence of probable cause is an element of a *Bivens* claim is outside the scope of the Petition, and the Court should not reach it. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993); *Yee*, 503 U.S. at 535. This is so even though the literal language of the Question Presented sweeps more broadly than the issue described in the Petition, for parties are not permitted to use artful drafting of the Question to expand the scope of the issues accepted for review. *See Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality op.) ("We disapprove the practice of smuggling additional questions into a case

Specifically, this case comes before the Court as an interlocutory appeal from the district court's denial of Petitioners' motion for summary judgment on their qualified-immunity defense. Appellate jurisdiction over such an interlocutory order is appropriate only because the denial of qualified immunity falls within that small class of "collateral orders" qualifying for immediate appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). But Petitioners' alternative argument—even if it had been presented to and ruled upon by the district court—does not independently qualify for review under the "collateral order" doctrine, *see id.*, as Petitioners appear to concede, *see* Pet. Br. at 37 n.12.

In *Swint v. Chambers County Commission*, this Court examined the authority of federal appellate courts, with interlocutory jurisdiction over a question of qualified immunity, to review, conjunctively, related rulings that are not themselves immediately appealable. 514 U.S. 35, 45-51 (1995). Overturning a lower court's exercise of such "pendent appellate" jurisdiction, the Court expressed doubts that pendent appellate jurisdiction would ever be appropriate (absent authorization by statute or rule), and ultimately concluded that pendent appellate jurisdiction could only be exercised—if at all—where either the pendent question is "inextricably intertwined with [the] decision to deny . . . qualified immunity" or "review of the [pendent issue] [i]s necessary to ensure meaningful review of the [issue over which the court has independent appellate jurisdiction]." *Id.*

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after we grant certiorari. The issues here are fixed by the petition . . . ."). Notably, Moore's Brief in Opposition to the Petition rephrased the question more precisely to reflect the legal issue on which the Petition and the decisions below were based: "Whether the court below properly applied this Court's [precedents] when it held that . . . the defendant officers are not entitled to qualified immunity." Resp. Br. in Opp. at i.

at 51.[14] Plainly, the question whether the absence of probable cause is an element of a *Bivens* claim is not inextricably intertwined with, or necessary to a review of, the independent questions whether Petitioners violated the First Amendment and whether Petitioners are entitled to qualified immunity. *See Gates*, 462 U.S. at 223; *Mt. Healthy*, 429 U.S. at 279-81; *supra* pp. 31-32, 36-37. Accordingly, the Court may not decide that question here.[15]

2. If this Court were to decide that this issue is reviewable, then it should hold that the absence of probable cause is not an element of a *Bivens* claim for damages. As explained above, the scope of constitutional rights cannot be constricted by the common law of torts. *See supra* pp. 30-31. At the same time, this Court has relied upon the common law in filling in the details of the federal causes of action to enforce those rights, turning to the common law for guidance on, for example, principles of damages, causation and immunities from suit. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986); *Carey v. Piphus*, 435 U.S. 247, 257-59 (1978). In doing so, however, the Court has remained cognizant of the fact that "[t]he federal remedy is supplementary to the state remedy," *Monroe v. Pape*, 365

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[14] *See also Johnson v. Jones*, 515 U.S. 304, 318 (1995) (expressing doubts about the propriety of pendent appellate jurisdiction); *Harlow v. Fitzgerald*, 457 U.S. 800, 820 n.36 (1982) (declining to address question about availability of *Bivens* action where Court "took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine"); *Abney v. United States*, 431 U.S. 651, 663 (1977); *United States v. Stanley*, 483 U.S. 669, 676-77 (1987).

[15] Petitioners acknowledge, but attempt to downplay, the jurisdictional problems created by their alternative argument. Pet. Br. at 37 n.12. But in doing so, Petitioners concede that, to reach their (unpreserved) alternative merits argument, the Court would first need to address a disputed jurisdictional question that itself was neither raised nor decided below and is outside the Question Presented.

U.S. 167, 183 (1961), and "broader than the pre-existing common law of torts," *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). Accordingly, the Court has "never suggested that the precise contours" of the constitutional tort action "can and should be slavishly derived from the often arcane rules of the common law." *Anderson*, 483 U.S. at 645. Rather, where "the interests protected by a particular branch of the common law of torts . . . parallel closely the interests protected by a particular constitutional right," it "may be appropriate to apply . . . tort rules" to constitutional claims. *Carey*, 435 U.S. at 258. But "[i]n other cases, the interests protected by a particular constitutional right may *not* also be protected by an analogous branch of the common law torts." *Id.* (emphasis added). Where the respective interests thus diverge, the Court has not hesitated to define the scope of a constitutional tort action "along principles not at all embodied in the common law." *Anderson*, 483 U.S. at 645. Indeed, a contrary rule would drain the constitutional tort remedies authorized by *Bivens* and § 1983 of any independent significance by relegating individuals to the same causes of action they have at common law.

Here, the interests at the heart of the First Amendment and those protected by the common-law tort of malicious prosecution are fundamentally different. "[T]he purpose behind the Bill of Rights, and of the First Amendment in particular [is] to protect unpopular individuals from retaliation" for the exercise of protected rights. *McIntyre*, 514 U.S. at 357. Thus, the government may not take adverse action against a person "*because of* [his] speech on matters of public concern," *Umbehr*, 518 U.S. at 674—even if the same action could have been taken against him "in the absence of the protected conduct," *Mt. Healthy*, 429 U.S. at 283-84; *see also supra* Part I. In particular, a person may not be subject to "prosecution"—even if the prosecution would otherwise have been justified—"*because of*" his protected speech. *Wayte*, 470 U.S. at 610; *see also supra* Part II. The common-law tort of malicious prosecution, in contrast,

protects an individual's "interest in freedom from *unjustifiable* and unreasonable litigation." 1 Fowler V. Harper *et al.*, *The Law of Torts* § 4.2, at 4:3 (3d ed. 1996) (emphasis added). "The action for damages lies only because the defendant has set in motion the judicial process against the plaintiff in circumstances that are . . . *unjustifiable* and that, therefore, unduly subject the plaintiff to the inconvenience, expense, and in some respects, disgrace of legal proceedings." *Id.* § 4.2, at 4:4; *see also, e.g.*, *Jackson v. Dist. of Columbia*, 710 F. Supp. 13, 14 n.1 (D.D.C. 1989).

Requiring a showing of lack of probable cause thus serves the interests behind the malicious prosecution tort. Because that tort aims to protect plaintiffs from the cost, expense, and burden of unjustifiable litigation, a plaintiff has suffered no wrong if the prosecution was objectively justified, as shown by the presence of probable cause. But a lack of probable cause, standing alone, does not safeguard the interests at the heart of the First Amendment—namely, the right to be free from adverse action taken in retaliation for protected speech. That right is no less violated, and no less cognizable, where the prosecution theoretically could have—but in fact would not have—been brought in the absence of the individual's exercise of his constitutional rights.

The fact that "[a]lmost every [constitutional tort] claim can be favorably analogized to more than one of the ancient common-law forms of action," and, therefore, that "any analogies to those causes of action are bound to be imperfect," *Wilson v. Garcia*, 471 U.S. 261, 272-73 (1985), provides yet another reason to eschew slavish incorporation of common-law tort elements into a constitutional tort claim. In this case, for example, one could also analogize Moore's *Bivens* claim to the tort of abuse of process, which makes a person liable for "us[ing] a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed," *Restatement (Second) of Torts*

§ 682 (1977), and for which "it is immaterial that the process was . . . obtained in the course of proceedings that were brought with probable cause," *id.* § 682 cmt. a. Indeed, given the gravamen of Moore's *Bivens* action—that Petitioners misused their investigatory authority and the grand jury process for the purpose of retaliating against Moore and depriving Moore and REI of the opportunity to compete for the USPS scanner contract, *see supra* pp. 4-9—the abuse of process tort may be a more apt analogy than the tort of malicious prosecution. *See Heck*, 512 U.S. at 495 n.2 (Souter, J., concurring in the judgment) (noting that where one sues to vindicate the right not to be "selected for prosecution" for an unconstitutional reason, "the tort of abuse of process might provide a better analogy"). Instead of attempting to choose between competing analogies, the Court should simply enforce the constitutional right at issue.

Heck v. Humphrey is not to the contrary. *Heck* involved a prisoner's attempt to challenge his ongoing detention by bringing a § 1983 claim for damages stemming from the allegedly unlawful acts that led to his arrest and conviction. 512 U.S. at 478-79. In holding that the prisoner's claim was not cognizable, the Court did little more than reaffirm a long-standing and sensible procedural bar to suits attempting to circumvent the stricter procedural requirements of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). The Court did look to the "favorable termination" element of the malicious prosecution tort as "illustrative of the common-law principle barring tort plaintiffs from mounting collateral attacks on their outstanding criminal convictions," *Heck*, 512 U.S. at 484 n.4, but none of the considerations of finality and consistency animating that principle, *id.* at 484-85, is even remotely applicable here. *See also id.* at 500 (Souter, J., concurring in judgment) (noting that Court's ruling "does not transpose onto § 1983 elements of the malicious-prosecution tort that are incompatible with the policies of § 1983 and the habeas statute"). Moreover, *Heck*'s application of a *general* principle of tort law (*i.e.*, "the hoary principle that civil tort

actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," *id.* at 486) to the constitutional tort cause of action is similar to the Court's incorporation into that cause of action of other *general* tort-law requirements, such as actual injury, *see Carey*, 435 U.S. at 264, and causation, *see Malley*, 475 U.S. at 344 n.7. In contrast, nothing in *Heck* requires a *Bivens* or § 1983 plaintiff to establish each substantive element of the common-law tort most analogous to the specific context in which the deprivation of constitutional rights occurred. *See Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir. 2003) (en banc) ("[C]laims of lost constitutional rights [relating to improper initiation of criminal charges] are for violation of rights locatable in constitutional text . . . . [T]hey are not claims for malicious prosecution and labeling them as such only invites confusion."), *cert. denied*, 125 S. Ct. 31 (2004).[16]

IV. THERE WAS NO PROBABLE CAUSE TO PROSECUTE MOORE

As Petitioners concede (Pet. Br. at 37), the court of appeals' conclusion that Petitioners' retaliatory conduct violated the First Amendment regardless of whether there was probable cause obviated the need for that court to consider whether, contrary to the conclusion of the district court (*see supra* p. 11 & note 3), there was probable cause as a matter of law. *See* Pet. App. 12a. Therefore, if the Court agrees with Petitioners that their conduct would not have violated the First Amendment if there was probable cause, then the Court should, in accordance with its ordinary practice, remand the case and permit the court below to

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[16] For the same reasons that they fail to support Petitioners' argument about the scope of the First Amendment right, Petitioners' policy arguments do not justify requiring a *Bivens* or § 1983 plaintiff to prove the absence of probable cause. *See supra* pp. 28-30, 32-36.

address that issue in the first instance. *See Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588, 595 (2004); *Ornelas v. United States*, 517 U.S. 690, 700 (1996); *Anderson*, 483 U.S. at 646 & n.6. Should the Court choose to reach the issue, however, a fair review of the facts shows that the exculpatory evidence was so powerful and the evidence of guilt so flimsy that Petitioners did not believe, and could not reasonably have believed, that there was probable cause to prosecute Moore. At a minimum, the facts are sufficiently in dispute to require a jury to decide this issue. *See Davis v. Giles*, 769 F.2d 813, 815 (D.C. Cir. 1985).

The primary charge against Moore, and the only count of the indictment that Petitioners defend (Pet. Br. at 37), was conspiracy to defraud the United States in violation of 18 U.S.C. § 371. J.A. 482, 517-18. The "essence" of criminal conspiracy is "an agreement to commit an unlawful act." *Iannelli v. United States*, 420 U.S. 770, 777 (1975). To prove such an agreement, the government must show not only that the defendant knew the other conspirators planned to commit a crime, "but also that with knowledge of their plan and objectives, he agreed to join them." *United States v. Wilson*, 160 F.3d 732, 737 (D.C. Cir. 1998). A conspiracy thus requires a "'meeting of minds' concerning the object of the conspiracy" or the "essential nature" of the criminal activity involved in the conspiracy. *United States v. Hitt*, 249 F.3d 1010, 1015 (D.C. Cir. 2001). Mere "general knowledge of a planned crime" is "insufficient." *Wilson*, 160 F.3d at 737-38.

In the context of an indictment, probable cause exists only if the facts are "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (internal quotation marks omitted, alteration in *Gerstein*)). In determining what a prudent man would believe, all evidence in the possession of the officer must be examined, including exculpatory evidence. *See, e.g.*,

Gardenhire v. Schubert, 205 F.3d 303, 318 (6th Cir. 2000); *DeLoach v. Bevers*, 922 F.2d 618, 620-21 (10th Cir. 1990). Under these standards, there was no probable cause to prosecute Moore for conspiracy to defraud the United States, and Petitioners knew it. In setting forth the purported evidence of probable cause, Petitioners fail to acknowledge the overwhelming evidence that Moore neither knew of the essential nature of the criminal activity involved in the Voss kickback conspiracy, nor agreed to join in it. Primary among the exculpatory evidence is the fact that, despite extraordinary pressure to implicate Moore and with no reason to protect him, the known conspirators unanimously denied that they ever told Moore, or anyone else at REI, about the payments at the core of the conspiracy. *See supra* pp. 5-6, 8. As a result of these statements—the veracity of which Petitioners had no reason to doubt—Petitioners conceded in a contemporaneous writing that, in their view, their evidence showed that REI, "*but not MOORE . . . individually*, w[as] aware of Voss' corrupt actions." J.A. 333 (emphasis added). Senior officials in the U.S. Attorney's Office, too, were highly skeptical of the case against Moore. *See supra* p. 7; J.A. 447, 453, 455.

The allegation that Moore conspired with Spartin to conceal Spartin's association with GAI and REI from the Postal Service (Pet. Br. at 39) was even more spurious. None of the coconspirators ever claimed that they told Moore that Spartin's role with GAI and REI was a secret or should not be disclosed. To the contrary, the evidence collected by the Postal Inspectors demonstrated that Spartin openly held himself out to various USPS officials as president of GAI, and that Moore knew this was so. *See Recognition Equip. Inc.*, 725 F. Supp. at 596-98. There simply was no evidence that Moore knew of this purported aspect of the conspiracy, let alone agreed to further its aims.

Moreover, Petitioners' improper and unethical behavior in preparing their case for the grand jury, *see supra* p. 8, can

only be explained by Petitioners' recognition that "their case needed bolstering." Pet. App. 27a. This bizarre behavior included: preparing, for each grand jury witness, carefully crafted statements that purposely omitted exculpatory evidence in violation of DOJ Guidelines; improperly controlling (without supervision by the Assistant U.S. Attorney) what evidence was presented to the grand jury; refusing to let at least one witness, Frank Bray, and his lawyer, now-district judge Ellen Huvelle, alter the witness statement that Petitioners had drafted for him; attempting to coerce another witness, William Spartin, into incriminating Moore, even taking the unprecedented step of participating in a preplanned ploy where the lead prosecutor and up to ten postal inspectors surrounded Spartin, accused him of lying and literally tore up a copy of his immunity agreement; improperly showing Spartin the grand jury statements of others in order to elicit a bogus "opinion" that was contrary to his personal knowledge; and engaging in unusual and aggressive lobbying of the U.S. Attorney's office to authorize Moore's prosecution. *See supra* pp. 7-8.

In the face of the profound evidence exonerating Moore, Petitioners cobble together various pieces of disputed and ambiguous evidence, and, relying on ostensibly reasonable inferences, argue that there was reason to believe Moore was guilty of a crime. Most of this evidence purports to show Moore's alleged knowledge of the conspiracy. *See* Pet. Br. at 4 ("had been aware"); *id.* at 18 ("suggest awareness"), *id.* at 40-41 ("evidence that respondent had knowledge"). As noted above, however, mere knowledge of a conspiracy is insufficient to create criminal liability. *See supra* p. 44. In all events, Petitioners' evidence is too weak to establish probable cause to believe that Moore even knew of the conspiracy—let alone committed a crime by agreeing to join it—particularly when the record is viewed most favorably to Moore, as it must be on summary judgment. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

1. Petitioners first point to the fact of Moore's indictment as "evidence" of probable cause. Pet. Br. at 39. An indictment is deprived of whatever probative force it may have had, however, where, as here, *see supra* p. 8, it was obtained by withholding evidence from, and misrepresenting evidence to, the grand jury. *See DeLoach*, 922 F.2d at 620-21; *White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988). Similarly, no inference of probable cause can be taken from the involvement of the U.S. Attorney's Office: the ordinary checks that might have prevented rogue law enforcement officers from procuring a baseless prosecution failed in this case because Petitioners were aided by an Assistant U.S. Attorney who admitted to placing personal career goals ahead of his consideration of Moore's guilt or innocence. *See supra* p. 7; J.A. 442, 445-46.

2. Petitioners suggest that Moore's knowledge of the conspiracy can be inferred from the retention of GAI. *See* Pet. Br. at 39. There was, however, nothing suspicious about Voss's recommendation of GAI, his interest in whether REI acted on that recommendation or the manner by which REI retained GAI. *See Recognition Equip.*, 725 F. Supp. at 590; *supra* p. 5. Similarly, Moore's comment that Reedy should not drop the ball on the GAI recommendation (Pet. Br. at 39) does not suggest anything illegal; it simply admonishes Reedy that he should give Voss, who was on the Postal Service Board of Governors, "the courtesy of following up as [Reedy] said [he] would." J.A. 156-57.

3. Petitioners contend that they had probable cause because Gnau told Reedy to refer to Voss as "our friend," and because, when Reedy asked Gnau about his relationship with Voss, Gnau answered, "[i]t's better you not know." Pet. Br. at 39-40. Even if it is assumed that this exchange may have raised some suspicions in *Reedy's* mind, Petitioners offer no evidence suggesting that Reedy passed any such suspicions on to Moore, other than a conclusory statement that such an inference would be reasonable. Pet.

Br. at 41. In fact, such an inference would have been unreasonable in light of the complete absence of any evidence that Reedy told Moore about any suspicions. *See* J.A. 164-65. Moreover, even if Reedy had harbored suspicions and communicated them to Moore, a conspiracy requires more than just suspicion that some criminal activity is afoot. *See, e.g.*, *Wilson*, 160 F.3d at 738. It requires evidence that the defendant knew of the conspiracy's operation and agreed to join in it. *Id.* at 737-38.

4. Petitioners point to Reedy's initial concealment of the fact that REI hired GAI at Voss's recommendation. *See* Pet. Br. at 40. Again, this evidence at best might raise inferences about Reedy, but there was nothing to tie it to Moore. Moreover, as Judge Revercomb observed, not much can be read into Reedy's misstatement because Reedy was upset at the time about improper conduct by Petitioner Edwards earlier that day and because the next time Reedy met with the inspectors "he apologized for lying and told the Inspectors that Voss had referred REI." *Recognition Equip.*, 725 F. Supp. at 595; *accord* J.A. 154-56, 215-17. Furthermore, a false exculpatory statement shows only knowledge that an individual was "caught up in a situation involving criminal activity," not knowledge of the essential operation of the conspiracy or agreement to further it. *United States v. Nusraty*, 867 F.2d 759, 765-67 (2d Cir. 1989); *see also United States v. Teffera*, 985 F.2d 1082, 1087 (D.C. Cir. 1993). Thus, Reedy's misstatements cannot establish probable cause to indict Moore. For similar reasons, Frank Bray's alleged alteration of travel records (Pet. Br. at 40) offers no support because of the absence of evidence suggesting that Moore was aware of the alterations.

5. There is nothing remotely suspicious about Moore's possession of information from a closed session of the USPS Board of Governors. Pet. Br. at 40. As Petitioners learned at the time, Moore received the information through legitimate congressional channels. J.A. 159-60. Similarly, the fact that

Moore's "Postal" notebook was missing pages (Pet. Br. at 40) has a completely innocent explanation: Moore occasionally removed pages from his notebooks for his secretary to type. J.A. 172-73. Petitioners may not have been aware of this explanation because they failed to ask Moore about the missing pages, but a law enforcement officer is not warranted in relying upon circumstances deemed by him to be suspicious when he fails to "avail himself of readily available information that would have clarified matters" *Sevigny v. Dicksey*, 846 F.2d 953, 957 (4th Cir. 1988). Likewise, the instructions given to REI employees interviewed by the inspectors (Pet. Br. at 40) are innocuous. These instructions—such as informing the employees that they can answer "I really can't remember" and should not try to "show . . . how smart you are"—are standard deposition defense advice, *see, e.g.*, David M. Maloney & Peter J. Hoffman, *The Effective Deposition* 90-94 (1993), and Petitioners knew they were taken from a commercial videotape on depositions that REI's attorneys used to counsel REI's employees. J.A. 173-74. Moreover, Petitioners knew that Moore had admonished REI employees to be helpful, accurate and honest. *Id.*

6. Finally, Petitioners point out that Moore told them that he did not believe Spartin was conducting a search for candidates to replace Carlin when, in fact, Moore recommended candidates and made an introductory call to one of them, Pet. Br. at 40, but they do not explain how any inference that Moore knew about the conspiracy and agreed to join it can be drawn from this statement. Petitioners point to Spartin's attempt to implicate Moore in his own cover-up as evidence of Moore's involvement in the conspiracy, *id.*, but as Spartin told Petitioners, Moore flatly refused to go along with Spartin's efforts to have him participate in the cover up, *see* J.A. 169-71. Moreover, Gnau confirmed that Moore was concerned that Spartin was trying to involve him in some kind of a cover up, not that Moore himself was involved in hiding any information. *Id.* Thus, Petitioners

were well aware that there was "no evidence that Moore tried to hide the fact that he recommended Casey to Spartin for the position of PMG." *Recognition Equip.*, 725 F. Supp. at 600.

In sum, the totality of Petitioners' evidence did not even "support a reasonable inference that [Moore] knew" of, let alone agreed to join, any illegal conspiracy. *Id.* at 589. Petitioners simply cannot escape the fact that they had in their possession powerful exculpatory evidence showing that Moore never agreed to join the conspiracy and that he lacked knowledge about its essential operation. Petitioners therefore lacked probable cause—indeed, they admitted it at the time, *see* J.A. 333 (conceding that REI, "but not MOORE . . . individually," may have been aware of the conspiracy)—and no reasonable officer could have thought otherwise. At a minimum, sufficient facts are in dispute to require the matter to be presented to a jury. *See Giles*, 769 F.2d at 815.

CONCLUSION

For the reasons set forth above, the decision of the court below should be affirmed.

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In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A showing that the prosecution lacked probable cause is a necessary element of a claim of First Amendment retaliatory prosecution. That rule provides an objective gateway for screening claims of retaliatory prosecution. It accords with the heightened deference traditionally afforded by the courts to the exercise of the prosecutorial function. It is deeply rooted in the common law tort of malicious prosecution, of which a claim of First Amendment retaliatory prosecution is simply one example. And, as with the tort of malicious prosecution generally, the requirement that the plaintiff establish the absence of probable cause as a necessary element of a First Amendment claim appropriately balances the public interest in encouraging the reporting of evidence of violations of the law to the prosecutor against the individual interest in not being subjected to baseless prosecution in retaliation for the exercise of First Amendment rights.

Under our constitutional system, the prosecutor and the grand jury exercise independent judgment in determining whether an individual will be prosecuted, and they therefore afford independent protection against unwarranted or malicious prosecutions. See *Gerstein* v. *Pugh*, 420 U.S. 103, 121 n.22 (1975); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). The decision to prosecute is inherently discretionary and sufficiently likely to provoke potential litigation that the prosecutor (like the grand jury) enjoys absolute immunity from suit, in order to serve the broader public interest in the vigorous and fearless performance of his duties, including the exercise of his independent judgment in deciding whether to prosecute. See *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). But the litigation that respondent envisions would routinely open up the prosecutorial decisionmaking process—a source of information relevant to the First Amendment plaintiff's burden to show that the retaliatory motive was the key causal

factor that led to the prosecution. The requirement to show an absence of probable cause thus furnishes a critical objective check against routine, chilling, and unwarranted judicial scrutiny of prosecutorial decisionmaking based on allegations concerning the motives of persons several steps removed from the ultimate decision to prosecute.

Respondent nonetheless contends (Br. 17-43) that a claim of retaliatory prosecution should not require a showing of an absence of probable cause for the charges and, indeed, should require *no* objective showing at all. As the brief of amici National League of Cities *et al.* underscores, however, the adoption of respondent's position would establish an inherently subjective and unworkable test that would chill legitimate law enforcement activities across the Nation. The various objections respondent raises to the probable cause element, moreover, are without merit. So, too, is respondent's contention (Br. 43-50) that there was no probable cause for the charges against him. Finally, respondent's assertions about the evidence of petitioners' motives (see Br. 4-8) are inaccurate. See pp. 18-20, *infra*.

I. TO ESTABLISH A CLAIM OF RETALIATORY PROSECUTION, A *BIVENS* PLAINTIFF MUST DEMONSTRATE THAT THERE WAS NO PROBABLE CAUSE FOR THE CHARGES

A. A First Amendment Claim Of Retaliatory Prosecution Does Not Lie If There Was Probable Cause For The Charges

1. Respondent contends that petitioners' submission —that absence of probable cause is an element of a First Amendment retaliatory prosecution claim—is "directly foreclosed" by the precedents of this Court stating that the decision to prosecute is "subject to constitutional constraints." Br. 23 (quoting *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979)); accord *id.* at 18-19. That is a *non sequitur*. It is undisputed that a prosecution can violate the First

Amendment. At issue is whether the absence of probable cause is a necessary element of such a First Amendment claim. As five courts of appeals have held, it is. Adoption of that rule by this Court obviously would not mean that there are no First Amendment limitations on the decision to prosecute. It would merely subject the decision to prosecute to a bright-line "constitutional constraint."

Respondent is also mistaken in his contention (Br. 20-22) that adoption of petitioners' view is foreclosed by *Crawford-El* v. *Britton*, 523 U.S. 574 (1998). That case presented the question whether there should be "special procedural rules" for any "constitutional claim that requires proof of improper motive." *Id.* at 577. The Court answered that question no. This case concerns the distinct question of what *substantive* rules govern a constitutional challenge to *a decision to prosecute*. Because such a decision is "particularly ill-suited to judicial review," *Wayte* v. *United States*, 470 U.S. 598, 607 (1985), and because judicial review would "impair the performance of a core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), this Court's cases "uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute," *Town of Newton* v. *Rumery*, 480 U.S. 386, 396 (1987) (opinion of Powell, J.). The plaintiff in *Crawford-El* did not challenge a decision to prosecute, and the case did not purport to alter the well-established principle—reaffirmed only two years earlier in *Armstrong*—that special considerations apply to constitutional challenges to prosecutorial decisionmaking.

Armstrong allows a challenge to a prosecution decision that was allegedly based on race. Government actions based on race are especially odious under the Constitution and are generally subject to exacting review, even in contexts where significant deference is given to decisions alleged to violate other constitutional provisions, including the First Amendment. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 1141 (2005) (holding deferential approach of *Turner* v. *Safley*, 482 U.S.

78 (1987), inapplicable to race-based equal protection claims). Even so, the Court has held that the standard for making out such a claim in the prosecution context is "rigorous" and "demanding," and requires an objective showing that similarly situated persons of a different race were treated differently. See pp. 6-7, *infra*. That requirement does not mean that prosecutorial decisionmaking is not subject to constitutional constraint, but it does prevent routine intrusion into prosecutorial decisionmaking. The showing required to make out a First Amendment retaliatory prosecution claim must likewise be rigorous and demanding, and must likewise avoid scrutiny of prosecutorial decisonmaking unless there is an objective showing—the absence of probable cause.

Respondent contends that petitioners' position is "conceptually incoherent," because "it makes no sense to say that the existence of a constitutional violation depends on the specific nature of the improperly motivated act." Br. 22-23. That contention is refuted by, *inter alia*, *Armstrong*, *Turner* v. *Safley*, and the line of cases that begins with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and includes *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), one of the principal authorities on which respondent relies. The cases in the *Pickering* line hold that, when a public employer takes an adverse action against an employee on the basis of his speech, the action violates the First Amendment only if the speech is "on a matter of public concern" and the employee's interest in expressing himself is not "outweighed by any injury the speech could cause to 'the interest of the * * * employer[] in promoting the efficiency of the public services it performs.'" *Waters* v. *Churchill*, 511 U.S. 661, 668 (1994) (opinion of O'Connor, J.) (quoting *Connick* v. *Myers*, 461 U.S. 138, 142 (1983), in turn quoting *Pickering*, 391 U.S. at 568). Out of concern for the special nature of government employment, this Court's decisions in that area make clear that the existence of a First Amendment violation depends on the nature of the speech

and the nature of the justification for the action—*i.e.*, the "specific nature" (Resp. Br. 23) of the challenged action.

The specific nature of a decision whether to file criminal charges is that it reflects the exercise of "one of the core powers of the Executive Branch of the Federal Government," *Armstrong*, 517 U.S. at 467, and is therefore a decision that courts are "properly hesitant to examine," *Wayte*, 470 U.S. at 608. For that reason, it "makes no sense" (Resp. Br. 22) to apply the First Amendment to that decision the same way it is applied to "any [other] official act" (*id.* at 18). Rather, just as First Amendment interests must be weighed against other important considerations under *Pickering* and its progeny, First Amendment interests in this context must be balanced against the fundamental public interests in the investigative and prosecutorial functions and the vigorous enforcement of the law. See also *Reno* v. *American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 487-492 (1999) (declining to recognize First Amendment selective enforcement claim in immigration context).

2. In our opening brief (at 21-24), we show that the court of appeals' approach is flawed because, *inter alia*, it allows challenges to prosecutions allegedly based on speech to proceed under more relaxed standards than challenges to prosecutions allegedly based on race. Respondent contends, however, that it is actually petitioners' rule that would "destroy the * * * symmetry between the First Amendment and the Equal Protection Clause in the prosecutorial context," because a racially motivated prosecution violates equal protection "even if the prosecution is supported by probable cause." Br. 25 (emphasis omitted). It is true that, under petitioners' approach, a claim of selective prosecution and a claim of retaliatory prosecution have different objective elements (just as they have different subjective elements): the former requires proof that the decision to prosecute was motivated by the defendant's race and that similarly situated members of a different race were not prosecuted, while the

latter requires proof that the decision was motivated by the defendant's speech and that there was no probable cause for the charges. Respondent's approach creates a far more fundamental asymmetry, however, because it does not require proof of *any* objective element for a claim of retaliatory prosecution as opposed to a claim of selective prosecution.

Indeed, respondent's approach creates *two* fundamental anomalies. Just as respondent's rule imposes a *lesser* burden on a retaliatory prosecution claimant than on a selective prosecution claimant (despite the similarity of their claims and the degree of intrusion into the prosecutorial function they entail), it imposes *no greater burden* on a retaliatory prosecution claimant than on a plaintiff alleging speech-based retaliation *outside the prosecutorial context* (despite the special considerations that govern challenges to prosecutorial decisionmaking). Respondent's approach also provides more protection in the First Amendment context despite the reality that, unlike race, which never plays a legitimate role in the decision to prosecute, First Amendment activity may often be highly relevant evidence that informs a decision to prosecute. See Pet. Br. 23-24.

Respondent disputes the need for any special rule for claims of retaliatory prosecution on the asserted ground that this Court's decision in *Armstrong* does not "create[] a special Equal Protection rule" for claims of selective prosecution. Br. 25. That is not correct. In *Armstrong* the Court said that, because "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive," it has "taken great pains" to explain that the "standard for the elements" of such a claim is "rigorous" and "demanding." 517 U.S. at 463, 464, 468 (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985)). Citing *Armstrong*, the Court in *AADC* reiterated that, "in the criminal-law field, a selective prosecution claim is a *rara avis*." *Id.* at 489. It remains a *rara avis* notwithstanding the obvious incentive of

criminal defendants to bring such claims, because this Court has recognized that "such claims invade a special province of the Executive—its prosecutorial discretion," and the Court accordingly has "emphasized that the standard for proving them is particularly demanding." *Ibid.* (citing *Armstrong*, 517 U.S. at 463-465). If there were no "special Equal Protection rule in the context of criminal prosecutions" (Resp. Br. 25), the language in those decisions would be inexplicable, particularly in view of the absence of comparable language in equal protection cases outside the prosecutorial context. If "[t]he *Armstrong* rule" were the general rule, moreover, a plaintiff in an ordinary case who could show that the challenged government action was taken "on the basis of discriminatory [racial] animus," but was "incapable of showing similarly situated individuals who were treated differently," would be unable to establish an equal protection violation. *Pyke* v. *Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001). As Judge Leval has observed, that is "clearly not the law" in the ordinary case. *Ibid.*[1]

Respondent also contends that, under his approach, a retaliatory prosecution claim and a selective prosecution claim are not fundamentally different. In particular, he asserts that the requirement of proof that a retaliatory prosecution claimant would not have been prosecuted but for his speech "serves the same purpose" that the "similarly situated" re-

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[1] Citing *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), respondent argues that, "under standard Equal Protection analysis applicable in all contexts, a showing of discriminatory effect is generally an 'important starting point' for showing that the adverse action furthered a discriminatory purpose." Br. 27 (quoting 429 U.S. at 266). What he seems to mean is that discriminatory effect is merely "circumstantial * * * evidence of intent." *Arlington Heights*, 429 U.S. at 266; see also *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). While that may be true in an ordinary equal protection case like *Arlington Heights*, *Armstrong* requires proof of discriminatory effect regardless of whether other circumstantial evidence independently establishes discriminatory purpose.

quirement serves in a selective prosecution case. Br. 28. That assertion is flawed on a number of levels. First, because causation is an element of any constitutional claim based on an improper motive, see *Crawford-El*, 523 U.S. at 593, it is an element of *both* selective prosecution claims *and* retaliatory prosecution claims, and thus the independent "similarly situated" element of the former performs an objective screening function with no counterpart in the latter. Second, while the "similarly situated" element is objective, the "but for" element is purely subjective: it asks whether the prosecution was motivated by the plaintiff's speech, and, if so, whether there were additional motivations for the prosecution that, by themselves, would have resulted in the filing of charges. Third, because, under respondent's approach, a retaliatory prosecution plaintiff does not have to establish any objective element, and because an improper motive is "easy to allege and hard to disprove," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El*, 523 U.S. at 585), respondent's standard makes it much easier for a retaliatory prosecution plaintiff to obtain discovery and defeat a motion for summary judgment than it is for a selective prosecution plaintiff, who must clear an objective hurdle. Finally, while it is the claimant in a selective prosecution case who bears the burden of establishing that similarly situated members of a different class were not prosecuted, under respondent's approach it is the government official who bears the burden of establishing that the prosecution would have been brought even if the plaintiff had not expressed the speech at issue. See Pet. App. 13a.

Particularly in light of the core Executive interests at stake in the decision whether to prosecute an individual for a crime and the public interest in encouraging the vigorous enforcement of the criminal laws, this is an area in which the need for a bright-line rule is paramount. Probable cause provides courts and law enforcement officers with a familiar ob-